



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CR. APPEAL. NO 123(A) OF 2017

NJUGUNA KABUKI NJAGI Alias MUSA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The appellant has applied through his notice of motion dated 12/4/2018 in which he seeks the following orders from this court:

i. *“THAT the Applicant/Appellant herein be and is hereby be admitted to Bond and or Bail pending the hearing and determination of the pending Appeal herein*

ii. *THAT the Honourable Court be pleased to issue such other and or further Orders that it may deem fit in the best interest of justice.*

iii. *THAT Costs of this application be proved (sic) for.”*

2. The application is brought under section 357 of Criminal Procedure Code [Cap 75] Laws of Kenya, which is supported by three grounds that are set out in the notice of motion. The grounds are as follows. First, the appellant has filed an appeal against both conviction and sentence in High Court, being Criminal Appeal No. 123A of 2017. The appellant also states that the application is merited and raises weighty issues of law and fact. Finally the applicant has stated that the application is made in good faith and has been filed without delay.

3. Furthermore, the appellant has in his 12 paragraphs supporting affidavit deponed to matters of fact in support of his application. First, he has stated that he is a law abiding citizen with a family and property herein Narok town. He has also stated that none of the exhibits which were produced in the trial court were recovered from his possession. He has also stated that he is an old man and is in poor health and his incarceration in prison will worsen his health condition. Finally, he has also stated that he has filed an appeal which has a high probability of succeeding and that unless he is released on bail pending appeal he is likely to suffer irreparable loss and damage.

4. Mr. Kilele for the appellant has filed written submissions in support of the application. He has cited a number of authorities including *Jivraj Shah v. R. (1986) KLR 605* in which that court stated as follows:

i. *The principal consideration in an application for bail pending appeal is, the existence of exceptional or unusual circumstances upon which the Court of Appeal can fairly conclude that it is in the interest of justice to grant bail.*

ii. *If it appears prima facie from the totality of the circumstances that the appeal is likely to be successful on account of some substantial point of law to be argued and that the sentence or substantial part of it will have been served by the time the appeal is heard, conditions for granting bail exist.*

iii. *The main criteria is that there is no difference between overwhelming chances of success and a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed and the proper approach is the consideration of the particular circumstances and weight and relevance of the points to be argued.*

5. The respondent has opposed the application and has filed written submissions. She has cited the same case of *Jivraj Shah v. R. (1986) KLR 605*. Additionally, he has cited *Munjia Michubu v. R. (2014) eKLR*. According to the two cases an application for bail pending appeal must demonstrate that his application has overwhelming chances of success. Additionally, and in the alternative thereto, she has to demonstrate that there are exceptional or unusual circumstances in his appeal.

6. I have considered the affidavit evidence, the submissions of both counsel and the applicable law. I find as a result that the following are the major issues for determination.

- i. Whether or not the appellant has demonstrated that his appeal has overwhelming chances of success.
- ii. Whether or not there are exceptional or unusual circumstances in his appeal.
- iii. Who bears the costs of this application?

ISSUES 1 AND 2

7. I find from the affidavit evidence and the applicable law that the appellant has not demonstrated that his appeal has overwhelming chances of success. I find from the medical reports of the appellant that he is of poor health but he has not demonstrated that the health facilities in prison are incapable of managing his condition. Additionally, I also find that his condition has not been shown to be an exceptional or an unusual circumstance.

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8. These are criminal proceedings. The issue of costs rarely arises in matters of criminal proceedings. And for that reason I will not make an order as to costs. This appeal is to be fixed for hearing on a priority basis.

9. The upshot of the foregoing is that this application fails. It is hereby dismissed in its entirety.

Ruling delivered in open court this 18th day of July, 2018 in the presence of Mr. Kilele for the appellant and Ms. Nyaroita for the respondent.

J. M. BWONWONGA

JUDGE

18/7/2018